Editor's note: Reconsideration denied by order dated Sept. 24, 1980

STATE OF ALASKA

IBLA 79-267 Decided February 20, 1980

Appeal from decision of the Fairbanks District Office, Bureau of Land Management, vacating decisions of October 13, 1960, and March 28, 1968, and declaring material site right-of-way F-026038 null and void ab initio.

Affirmed.

1. Administrative Authority: Generally -- Rights-of-Way: Nature of Interest Granted

   In granting a right-of-way over public lands pursuant to the Federal Aid Highway Act of 1958, 23 U.S.C. § 317 (1976), the Secretary of the Interior does not give up administrative authority over the lands subject to the right-of-way. Subsequent issuance of a patent for lands encompassing a Federally granted right-of-way issued under the Federal Aid Highway Act, supra, does not change the Secretary's jurisdiction over the right-of-way grant.

2. Administrative Procedure: Hearings -- Constitutional Law: Due Process -- Rules of Practice: Appeals: Effect of -- Rules of Practice: Hearings

   Timely appeal to the Board of Land Appeals suspends the effect of a Bureau of Land Management decision pending outcome of the appeal. Due process does not require notice and a prior right to be heard in every case where an individual may be deprived of property so long as the individual is given notice and an opportunity to be heard before the deprivation becomes final.

3. Applications and Entries: Generally -- Segregation

A permit allowing free use of mineral materials does not segregate the subject lands from further appropriation; rather, subsequent claims and entries are subject to the terms of the permit.

4. Applications and Entries: Generally -- Segregation

It is well established that an entry on public land under the laws of the United States segregates the land from the public domain, appropriates it to private use, and withdraws it from subsequent entry or acquisition until that entry is finally cancelled. Applications for interest in public lands must be rejected if the lands are not available for the requested disposition at the time they are filed or considered. Where a right-of-way was granted to lands subject at the time to a valid homestead entry, BLM properly declares the grant null and void ab initio.

5. Estoppel

The elements of an estoppel are the following: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

Estoppel of the Government is an extraordinary remedy, especially as it relates to public lands, and is to be applied with the greatest care and circumspection.

6. Eminent Domain

Eminent domain is the power of the sovereign to take private property for a public use without the owner's consent, conditioned on payment of just compensation. A state has

no right to condemn Federally owned lands absent consent from the Congress of the United States.

APPEARANCES: Avrum M. Gross, Attorney General, William R. Satterberg, Jr., and Gary W. Vancil, Assistant Attorneys General, State of Alaska, Juneau; Robert E. Price, Esq., Price & Yoshida, Homer, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

The State of Alaska (hereinafter the State) appeals from the decision of the Fairbanks District Office, Bureau of Land Management (BLM), dated January 4, 1979, vacating its decisions of October 13, 1960, and March 28, 1968, and thereby declaring material site right-of-way F-026038 null and void ab initio. The right-of-way (ROW) covers approximately 60 acres of land lying within the E 1/2 SW 1/4 NE 1/4 and SE 1/4 NE 1/4 sec. 26, T. 1 N., R. 2 E., Fairbanks meridian.

In the past 25 years the land involved in this appeal has been the subject of three homestead entries and a free use permit in addition to the State's ROW grant. We believe that it would be useful to set out these actions in chronological order.

(1) August 23, 1954. BLM granted a free use permit (F-011683) to the Alaska Road Commission for 200,000 cu/yards of gravel for road construction from a site on E 1/2 SW 1/4 NE 1/4 and SE 1/4 NE 1/4 sec. 26, T. 1 N., R. 2 E., Fairbanks meridian. The permit was to expire on August 23, 1964.

(2) July 5, 1955. BLM allowed a homestead entry (F-012464) to Richard D. Fuller on S 1/2 NE 1/4 sec. 26, T. 1 N, R. 2 E., Fairbanks meridian. By decision of July 29, 1955, BLM declared that portion of the entry which conflicted with the free use permit to be subject to the terms of the permit.

(3) August 26, 1959. BLM cancelled the Fuller entry following a contest by Darhl Tingey and awarded Tingey the preference right to the land.

(4) June 17, 1960. BLM allowed a homestead entry (F-023622) to Tingey on S 1/2 N 1/2 sec. 26, T. 1 N., R. 2 E., Fairbanks meridian.

(5) June 27, 1960. BLM received an application from the Alaska Department of Public Works for a material site ROW for the same site as covered by the 1954 free use permit.

(6) July 18, 1960. The land status plat of this date for the proposed ROW did not show the Tingey homestead entry.

(7) July 20, 1960. BLM granted advance permission to construct the ROW. The notice stated that permission was "subject to valid existing rights" and did "not cover any entered or non-Federal land."

(8) July 25, 1960. BLM transferred the free use permit to the Alaska Department of Public Works.

(9) October 13, 1960. BLM granted the ROW to the lands for use as a source of construction materials. The grant contained the standard condition that the ROW was subject to "[a]ll valid rights existing on the date of the grant."

(10) January 18, 1963. BLM terminated the free use permit noting that it was top filed by the ROW.

(11) June 22, 1964. BLM cancelled the Tingey homestead entry following a contest by Leroy Wells and awarded Wells the preference right to the land.

(12) October 9, 1964. BLM allowed a homestead entry (F-033118) to Wells for S 1/2 N 1/2 sec. 26, T. 1 N., R. 2 E., Fairbanks meridian. This entry was made expressly subject to a ROW for a Federal Aid Highway and the material site at issue in this case.

(13) June 22, 1967. BLM issued patent No. 50-67-0584 to Wells for the above described lands but again it was subject to the ROW for the highway and the material site.

(14) March 28, 1968. BLM accepted proof of utilization submitted by the Alaska Department of Highways in order to retain the material site ROW.

Following issuance of the patent a dispute arose between the State and Wells as to the removal of certain improvements on lands encompassed by the material site ROW. After a hearing, the Alaska State Fourth Judicial District Superior Court granted summary judgment for the State concluding in part that the State had acquired a fee simple interest in the land encompassed by the ROW and ordered Wells to vacate the land. Wells v. State of Alaska, C.A. No. 77-1934. The case record indicates that the parties had, at one time, agreed that the court's judgment was in error in so far as it declared that the State had acquired fee simple title from the Federal Government.

Following the court's action, BLM reviewed the conflict between the Wells homestead patent and the ROW and concluded that the grant of the ROW to the State was improper citing the long-standing Departmental policy that where lands have been segregated from appropriation, a subsequent application for those lands must be rejected. BLM found that the Tingey homestead entry had segregated the lands before

the application for a ROW was submitted and therefore the application should have been rejected. By decision of January 4, 1979, BLM declared the ROW null and void ab initio.

In its statement of reasons, the State lists the following reasons for its appeal:

1. The Department has no administrative authority to contest a 23 US 317 material site after the grant is final.

2. The Department has no administrative authority to nullify a 23 US 317 grant some thirteen years after the patent, with reservations, was entered.

3. That the Department's Decision exceeds the purview of its administrative rules and guidelines in that, by removing the material site from its status plat before the state had any opportunity to be heard on any of these issues, the state has been deprived of a valuable property right without due process of law.

4. The Department failed to consider that the free use permit segregated the land from the homestead entry, 43 CFR 221.47-51.

5. The Department failed to consider that the free use permit was issued when the land was segregated from homestead entry by Public Land Order 585.

6. The Department failed to consider that the material site was conveyed by quitclaim by an agent of the Department of the Interior by deed to the State in 1959, in accordance with the Omnibus Act.

7. The Department failed to consider that both Fuller and Tingey abandoned their interests prior to contest, and that the land returned to the public domain, and was accordingly available for grant to the state.

8. The Department incorrectly cites 43 CFR 2091.1(b) as relating to existing 23 US 317 grants; the State's application was at no time "rejected pending future availability of land", but in fact, had been granted and recorded both on the face of each entry and the patent recorded in the State Recorder's Office years prior to the patent.

9. That even if the material site was granted erroneously, it was neither "authorized without proper authority" nor accordingly "null and void" from its inception.

In a supplementary memorandum, the State expanded on point 8 by stating that the Tingey homestead entry was not reflected on the historical index until July 29, 1964, and that therefore the ROW grant was not improper under 43 CFR 2091.1 which the BLM decision had cited. That regulation provides for rejection of applications where land involved is subject to "[a]n allowed entry or selection of record." The State further contends that BLM should be estopped from vacating the decision which granted the ROW.

[1] We turn first to the State's contention that the Department has no administrative authority to contest and then nullify the material site ROW under the circumstances of this case. BLM granted the ROW under the authority of the Federal Aid Highway Act of 1958, 23 U.S.C. § 317 (1976). Section 317 does not expressly create authority to revoke or nullify a ROW granted under the terms of that provision. However, as we have noted frequently, the Secretary of the Interior has a continuing responsibility for the proper management of the public lands. The ROW grant allowed use of public lands for a materials site; it did not transfer title to the lands. Therefore, the lands remain part of the public domain and under the Secretary's jurisdiction.

That continuing jurisdiction is recognized by Departmental regulations applicable to section 317 grants. These regulations include the general regulations governing all Departmental ROW grants, 43 CFR Subpart 2801, and those specifically promulgated in response to section 317, 43 CFR Subpart 2821. 1/ The nature of the interest granted to the State is defined in 43 CFR 2801.1-1 as follows:

> § 2801.1 Nature of interest granted; settlement on the right-of-way; rights of ingress and egress.
>
> § 2801.1-1 In form of easement, license, or permit.
>
> No interest granted by the regulations in this part shall give the holder thereof any estate of any kind in fee in the lands. The interest granted shall consist of an easement, license, or permit in accordance with the terms of the applicable statute; no interest shall be greater than a permit revocable at the discretion of the authorized officer unless the applicable statute provides otherwise. [Emphasis added.]

Since the statute, 23 U.S.C. § 317 (1976), does not set conditions for the Government terminating a ROW grant, revocation of the ROW is at

1/ Similar regulations on rights-of-way in effect in 1960 were found at 43 CFR Part 244, Subparts A and G.

the discretion of the BLM authorized officer. In addition, this Board has stated previously that the Secretary does not give up all rights over lands subject to section 317 ROW grants because the regulations infer that BLM has the authority to cancel a ROW grant. State of Alaska, Dept. of Highways, 20 IBLA 261, 268-69, 82 I.D. 242, 244-45 (1975); 43 CFR 2801.2-3; 43 CFR 2802.3-1. Implicit in the authority to revoke or cancel the ROW grant is the authority to review the present and past circumstances of the grant. It would be contrary to the public interest if the Department could not correct an unauthorized action or an action contrary to law.

The State seems to infer by the second contention in its statement of reasons that the issuance of the patent to Wells should change our conclusion that BLM has jurisdiction to nullify the ROW grant. We disagree. In issuing a patent for lands encompassing the ROW, the Department did not change the terms or status of the ROW or convey its rights as to the ROW to Wells. The appropriate regulation, 43 CFR 2802.3-2, states:

> § 2802.3-2 Changes in jurisdiction over or disposal of lands
>
> * * * * * * *
>
> (b) The final disposal by the United States of any tract traversed by a right-of-way shall not be construed to be a revocation of the right-of-way in whole or part, but such final disposition shall be deemed and taken to be subject to such right-of-way until it is specifically canceled.

In Southern Idaho Conference Ass'n. of Seventh Day Adventists v. United States, 418 F.2d 411 (9th Cir. 1969), the Ninth Circuit Court of Appeals was confronted with the claim of a patentee that it had acquired the right to revoke a ROW grant by virtue of receiving a patent containing a ROW reservation. The circumstances of the case were notably similar to those before us. The United States appropriated a material site under 23 U.S.C. § 317 (1976) and granted a material use permit to the State of Idaho. BLM issued a patent to land including the material site to the Seventh Day Adventists. After examining section 317 and the regulations quoted here, the court concluded that "[t]he United States still retained the easement in the material site subject to the permit," and that therefore it retained the right to revoke or cancel. 418 F.2d at 415. Thus, authority to cancel or revoke the grant remains in the United States.

[2] The State also claims that removal of the material site from the status plats before it has had an opportunity to be heard is a violation of due process of law. The BLM decision stated that "the right-of-way will be removed from the status records * * * and the

case file closed when this decision becomes final" (Emphasis added). Departmental regulations state expressly that a timely appeal suspends the effect of the decision pending the outcome on appeal. 43 CFR 4.21(a). Since the State has exercised the right to appeal to this Board, the BLM decision has not become final. Due process does not require notice and a right to be heard prior to an initial decision in every case where a person is deprived of property, so long as the individual is given notice and an opportunity to be heard before the decision becomes final. Appeal to this Board satisfies the due process requirements. Dorothy Smith, 44 IBLA 25 (1979); H. B. Webb, 34 IBLA 362 (1978).

[3] The State contends that BLM should have considered the effect of the free use permit on the entries in conflict and asserts that the free use permit segregated the lands involved from homestead entry. 2/ That assertion is incorrect. BLM issued the free use permit under the authority of 43 U.S.C. § 1185 (1952) (now 30 U.S.C. § 601 (1976)) and 43 CFR Part 259 (1953) -- Disposal of Materials. The applicable regulation at the time, 43 CFR 259.21(d), states:

> (d) A free-use permit may be issued to any Federal, State, or Territorial agency * * *. Such permits shall constitute a superior right to remove the materials and will continue in full force and effect, in accordance with it terms and provisions, as against any subsequent claim to or entry of the lands. [3/]

The free use permit did not segregate the lands from further appropriation; rather, the subsequent claims and entries were made subject to the free use permit.

The consequences stemming from the fact that the free use permit was issued when the land was segregated from homestead entry by Public Land Order (PLO) No. 585 has no bearing on this case. PLO No. 585 was revoked as to the lands involved herein by PLO No. 1124, (20 FR 2614 (Apr. 14, 1955)). The validity of the Tingey homestead entry is not affected whether the entry was subject to the prior free use permit or the permit was invalid.

The State has provided no documentation for its claim that this Department conveyed the material site to the State by quitclaim deed in 1959 pursuant to the Alaska Omnibus Act of 1959. As later noted by the State in its supplementary statement of reasons, the free use permit (F-011683) originally issued to the Alaska Road Commission was

2/ The State's citation to 43 CFR 221.47-51 is in error. These regulations concerned appeals to the director of BLM under rules of practice found in the 1954-56 CFR.
3/ The same regulation is currently found at 43 CFR 3621.2.

transferred in 1960 to the Alaska Department of Public Works under section 21(a) of that Act. The character of the permit did not change, only the permittee.

[4] The State's last three statements dispute the substance of the BLM decision; that is, whether the lands in question were open to appropriation in the form of the right-of-way granted in this case. The Department has long followed the rule that an entry on public land under the laws of the United States segregates the land from the public domain, appropriates it to private use, and withdraws it from subsequent entry or acquisition until that entry is finally cancelled. R. B. Whitaker, 63 I.D. 124, 127 (1956); Rippy v. Snowden, 47 L.D. 321 (1920). As a corollary to that rule the Department has consistently held that applications for interests in public lands must be rejected if the lands are not available for the requested disposition at the time they are filed or considered. J. G. Hatheway, 68 I.D. 48, 51 (1961), and cases cited therein. The regulation referenced by the BLM decision, 43 CFR 2091.1, is a current expression of that policy. However, we must look to the regulations as promulgated at the time of the entry and application at issue to fairly determine if the right-of-way application should have been rejected. In 1960 there was no regulation comparable to 43 CFR 2091.1. Instead, 43 CFR Part 101, the general regulations governing applications and entries defined the point when lands were segregated from further appropriation. The applicable regulation, 43 CFR 101.2 (1960) stated:

> Segregation of Land Under Application
>
> § 101.2 Payments required to effect segregation of land.
>
> (a) The minimum fees or payments necessary to gain segregative effect for agricultural and other kind of applications or selections shall be those which are prescribed by existing regulations in connection with the particular application or selection that may be involved.

In addition, earlier decisions of the Department recognized that a homestead application, filed for land subject to homestead entry, when accompanied by the required showing and payment of fees had the segregative effect of an allowed entry. When actually allowed, all rights acquired related back to the date that the application was filed. Rippy v. Snowden, supra; Charles C. Conrad, 39 L.D. 432 (1910). The Tingey homestead application file (F-023622) contains copies of receipts for required fees all of which were paid by Tingey prior to the State's ROW application. We find that BLM exceeded its authority in granting the ROW on lands segregated from entry and conclude that BLM has properly declared that grant null and void.

[5] The State also argues that BLM should be estopped from vacating the grant of the ROW.

On several occasions, this Board has acknowledged the passing of the traditional rule that estoppel cannot be invoked against the Government and has recognized the elements of estoppel set forth by the Ninth Circuit in United States v. Georgia-Pacific Company, 421 F.2d 92 (9th Cir. 1970) as the initial test for determining whether estoppel is appropriate. Edward L. Ellis, 42 IBLA 66 (1979); United States v. Larsen, 36 IBLA 130 (1978); Henry E. Reeves, 31 IBLA 242 (1977). The elements of estoppel as identified in Georgia-Pacific are:

> (1) The party to be estoppel must know the facts; (2) he must intend that this conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; (4) he must rely on the former's conduct to his injury.

However, we have also agreed with that statement in the decision of the district court in United States v. Eaton Shale Co., 433 F. Supp. 1256, 1272 (D. Colo. 1977), which declared that "estoppel of the government is an extraordinary remedy, especially as it relates to public lands, and is to be applied with the greatest care and circumspection." Edward L. Ellis, 42 IBLA 66 (1979).

The State contends that each of the above elements is present in this case as follows:

> All of the four elements of estoppel required by the courts are present in this case. (1) BLM officials were aware of the Notice of Allowance F 023622 of June 23, 1960 to Tingey. (2) The BLM issued the right of way to the state in F 026038. (3) The state was not aware that there had been a Notice of Allowance F 023622 at the time of its receipt of grant of right of way. (4) The state has relied upon the conduct of the BLM to its injury. It has not only actively used the gravel source since the BLM grant of 1960, but refrained from initiating a contest against Tingey in the same manner that was done at a later date by Wells, filing an eminent domain action against the property in 1960, or taking other appropriate action to economize federally granted highway funds. There has been approximately 18 years of reliance upon the BLM grant by the state.

Assuming, arguendo, that the first three elements have been met, we are not convinced that the State has relied on the ROW grant to its injury such that estoppel should be applied. Unless the State is billed for the materials, the State will have had a free source of materials for almost 20 years and thereby has benefited over those

years from the Department's mistake, not been injured by it. Although it is obvious that the State will no longer have access to the material site if the ROW grant is vacated, the State has presented no evidence as to any injurious impact on the State as a result of the loss of the material site. Examination of the case record seems to indicate that in fact relatively little use has been made of the site. Similarly, although the State has lost the right to contest the Tingey entry, 4/ when we translate that lost right into loss of access to the material site we again have no evidence of injury such that estoppel should be invoked.

[6] The State's argument that they have lost the opportunity to file an eminent domain action against the property in 1960 is equally unavailing. Eminent domain is the power of the sovereign to take private property for public use without the owner's consent, conditioned on payment of just compensation. Transwestern Pipeline Co. v. Kerr-McGee Corp., 492 F.2d 878 (10th Cir. 1974), cert. denied, 419 U.S. 1097 (1975). It is well established that a State has no right to condemn Federally owned lands absent consent from the Congress of the United States. U.S. Const. art. IV, § 3; Utah Power & Light Co. v. United States, 243 U.S. 389 (1917); United States v. 161 Acres of Land, 427 F. Supp. 582 (D. Colo. 1977).

Finally as to the State's last claim in its supplemental statement, we only note that since the State has had the benefit of the use of the material site since 1960 it arguably has not been necessary to take other action to economize Federally granted highway funds and for the future there is nothing in this decision which now prevents them from so doing.

4/ The regulations on contest proceedings both now and in 1960 state that:

"Any person who claims title to or an interest in land adverse to any other person claiming title to or an interest in such land * * * may initiate proceedings to have the claim of title or interest adverse to his claim invalidated for any reason not shown by the records of the Bureau of Land Management."

43 CFR 4.450-1; 43 CFR 221.51 (1960).

The Department has recognized States as included in the term "person" within the meaning of the regulations, allowing them to initiate private contests. See State of California v. Doria Mining and Engineering Corp., 17 IBLA 380 (1970), aff'd, Doria Mining and Engineering Corp. v. Morton, 420 F. Supp. 837 (D. Calif. 1976), rev'd on other grounds, No. 77-1163 (9th Cir. Nov. 2, 1979); State of California v. E. O. Rodeffer, 75 I.D. 176 (1968); State of Louisiana v. State Exploration Co., 73 I.D. 148 (1966). Therefore, under the regulation, if a State claims an adverse title or interest in land it may institute a contest against the adverse claimant.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

James L. Burski
Administrative Judge

We concur:

Joseph W. Goss
Administrative Judge

Anne Poindexter Lewis
Administrative Judge